



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/691,379	04/20/2015	Al Sprosta	10732-00-US-01-TB	9672
23909	7590	02/04/2019	EXAMINER	
COLGATE-PALMOLIVE COMPANY			NOBREGA, TATIANA L	
909 RIVER ROAD			ART UNIT	
PISCATAWAY, NJ 08855			PAPER NUMBER	
			3772	
			NOTIFICATION DATE	
			DELIVERY MODE	
			02/04/2019	
			ELECTRONIC	

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

Patent_Mail@colpal.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte AL SPROSTA and EDUARDO JIMENEZ

Appeal 2018-005725
Application 14/691,379
Technology Center 3700

Before EDWARD A. BROWN, MICHAEL L. HOELTER, and
ANNETTE R. REIMERS, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL¹

STATEMENT OF THE CASE

This is a decision on appeal, under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1–4 and 10–21, which constitute all the claims pending in this application. App. Br. 1. We have jurisdiction under 35 U.S.C. § 6(b). For the reasons explained below, we do not find error in

¹ Colgate-Palmolive Company is identified as the applicant in the Application Data Sheet dated April 20, 2015 submitted in association with this application. Colgate-Palmolive Company is also identified as the real party in interest and as assignee to this application. *See* App. Br. 2. Accordingly, pursuant to 37 C.F.R. § 1.46, we understand Colgate-Palmolive Company is the Appellant.

the Examiner's rejections of these claims. Accordingly, we AFFIRM the Examiner's rejections.

CLAIMED SUBJECT MATTER

The disclosed subject matter relates to “a method of forming a product array or a product array formed thereby,” and more particularly, “a product array of a plurality of oral care kits.” Spec. ¶¶ 3, 4. Claims 1, 10, and 12 are independent.

Claim 1 is illustrative of the claims on appeal and is reproduced below.

1. A method of forming a product array of a plurality of oral care kits, the method comprising:
 - a) selecting from a plurality of oral care materials, a first oral care material that provides a first oral care benefit and a second oral care material that provides a second oral care benefit, the first oral care benefit being different than the second oral care benefit;
 - b) selecting from a plurality of types of tooth cleaning elements, a first type of tooth cleaning element that provides the first oral care benefit and a second type of tooth cleaning element that provides the second oral care benefit;
 - c) mounting a first plurality of tooth cleaning elements to a head portion of a first toothbrush body to form a first toothbrush, the first plurality of tooth cleaning elements comprising at least one of the first type of tooth cleaning element;
 - d) mounting a second plurality of tooth cleaning elements to a head portion of a second toothbrush body to form a second toothbrush, the second plurality of tooth cleaning elements comprising at least one of the second type of tooth cleaning element;
 - e) forming a first oral care kit comprising the first oral care material, the first toothbrush, and a first package; and

- f) forming a second oral kit comprising the second oral care material, the second toothbrush, and a second package; wherein the first oral care material is a tooth whitening agent, the first type of tooth cleaning element is a spiral bristle, the second oral care material is a tooth anti-sensitivity agent, and the second type of tooth cleaning element is a tapered bristle or an end-rounded bristle having a diameter of 5 mils or less; and wherein the first and second package are separate.

REFERENCES

Jimenez et al.	US 2012/0275843 A1	Nov. 1, 2012
Hohlbein et al.	US 2013/0276815 A1	Oct. 24, 2013
Kirchhofer et al.	US 2013/0291320 A1	Nov. 7, 2013

THE REJECTIONS ON APPEAL²

Claim 16 is rejected under 35 U.S.C. § 112(b) as being indefinite.

Claims 10 and 11 are rejected under 35 U.S.C. § 102(a)(1) as being anticipated by Jimenez.

Claims 12–14 and 16–18 are rejected under 35 U.S.C. § 102(a)(1) as being anticipated by Hohlbein.

Claims 1–3 and 19–21 are rejected under 35 U.S.C. § 102(a)(1) as being anticipated by, or in the alternative, under 35 U.S.C. § 103 as being unpatentable over Hohlbein.³

² Claim 2 was objected to for ending in “; and.” Final Act. 2. An amendment was filed after the Final Rejection in which “; and” was deleted from claim 2. *See* Amendment filed September 6, 2017. Appellant’s claim amendment was entered by the Examiner. *See* Advisory Action dated September 27, 2017. We thus understand that this objection has been resolved and is not before us for review.

³ Claims 19–21 depend from independent claim 12, not claim 1. Appellant states that whether “under 35 U.S.C. §§ 102(a)(1) & 103,” claims 19–21 “stand or fall with independent claim 12.” App. Br. 4.

Claims 4 and 15 are rejected under 35 U.S.C. § 103 as being unpatentable over Hohlbein and Kirchhofer.

ANALYSIS

The rejection of claim 16 as being indefinite

Parent claim 12 recites “a first toothbrush comprising a first type of tooth cleaning element” and “a second toothbrush comprising a second type of tooth cleaning element.” The Examiner states that dependent claim 16 “requires the first and second toothbrushes be structurally identical” but “[i]t is unclear how they can be identical if the cleaning elements are designed to achieve particular oral care benefits which differ.” Final Act. 2. Thus, the Examiner determines that “[c]laim 16 appears to contradict claim 12.” Final Act. 2.

Appellant’s amendment dated September 6, 2017 (filed after the Final Rejection) amended claim 16 to recite “wherein the first and second toothbrush *bodies* are structurally identical.” Emphasis added. This amendment was entered by the Examiner. *See* Advisory Action dated September 27, 2017. Notwithstanding the entry of the amendment, the Examiner stated, “[t]he rejection of record is maintained.” Adv. Act. 2. Because: the Examiner has not expressly withdrawn this rejection; Appellant now employs the claim term “toothbrush bodies,” which has no antecedent basis; the term “body” or “bodies” is not recited in the Specification; it is unclear whether the term “bodies” equates to “handle portions,” “head portions,” or both (*see* Spec. ¶ 33); and, Appellant does not contest this rejection, we affirm the rejection of claim 16 as being indefinite.

*The rejection of claims 10 and 11
as being anticipated by Jimenez*

Appellant does not offer arguments in favor of claim 11 separate from those presented for independent method claim 10. *See* App. Br. 13–15; *see also* Reply Br. 2–5. We select claim 10 for review, with dependent claim 11 standing or falling therewith. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Jimenez discloses the recited steps, and specifically, the steps in which the first oral care material and the first cleaning element assembly provide a first oral care benefit and the second oral care material and the second cleaning element assembly provide a second oral care benefit that is different than the first oral care benefit. Final Act. 3–4 (citing Jimenez Figs. 1–7B; ¶ 93).

Appellant contends, “[t]here is simply no disclosure [in Jimenez] of specific tooth engaging elements which provide a given oral care benefit, let alone any pairing of tooth engaging elements with the oral care material in the dispenser” that provide the same oral care benefit. App. Br. 15.

Appellant also states, “it is entirely plausible [in Jimenez’ disclosure] that the designer of an oral care kit might choose to use cleaning elements and oral care agents resulting in different oral care benefits.” App. Br. 15.

Appellant’s contentions are unpersuasive. Jimenez discloses: (1) “the head **230** may be detachable (and replaceable) from the handle **210**” (Jimenez ¶ 57); (2) “‘tooth engaging elements’ include, without limitation, bristle tufts, filament bristles, fiber bristles, nylon bristles, spiral bristles, rubber bristles, elastomeric protrusions, flexible polymer protrusions, combinations thereof and/or structures containing such materials or combinations” (Jimenez ¶ 59); and (3)

[t]he oral care system **100** of FIGS. 1–7B can also be sold as a *kit*. Any kit can include at least one toothbrush **200** and one dispenser **300** holding an oral care agent. In other embodiments, a kit may include at least one toothbrush **200** and a plurality of dispensers **300**; *each dispenser 300 holding a different oral care agent formulation (e.g. whitening, enamel protection, anti-sensitivity, fluoride, tartar protection, etc.)*. . . . In yet further embodiments of the kit, toothbrush **200** may have a user-replaceable head **230** and *the kit may include one or preferably more such heads of different types and/or configurations of tooth cleaning/engaging elements 235 and/or tongue cleaners*.

Jimenez ¶ 93 (emphasis added).

We agree with the Examiner that based on these paragraphs, Jimenez discloses different pairings of cleaning element assemblies/oral care materials; and further, Jimenez suggests that, within a pair, the oral care benefits will match, but that between pairs, the oral care benefits will differ. *See* Ans. 21–22. In short, Jimenez discloses different permutations or combinations of pairings for different purposes. Regarding Appellant’s statement that “it is entirely plausible [in Jimenez’ disclosure] that the designer of an oral care kit might choose to use cleaning elements and oral care agents resulting in different oral care benefits” (App. Br. 15), the Examiner explains,

the logic used [by Appellant] amounts to an *admission* that it is also plausible to provide cleaning elements and oral care agents *with the same oral care benefit as well* because if one of ordinary skill in the art would understand from the disclosure that whitening composition can be effectively used with a toothbrush having anti-sensitivity bristles that negate the sensitizing effects of the whitening process then surely one of ordinary skill in the art would understand that a whitening composition can be effectively used with a whitening toothbrush (e.g. toothbrush having spiral bristle) or that an anti-sensitivity toothbrush is effectively used with an anti-sensitivity composition, etc. *as such*

pairings are more easily deduced since they are recognized as being for the same purpose.

Ans. 23 (emphasis added).

We further note that claim 10 does not specify what constitutes “an oral care benefit” or what feature makes an oral care benefit “different” from another oral care benefit. We thus determine that the Examiner’s findings are proper. Accordingly, and based on the record presented, we are not persuaded the Examiner erred in rejecting claims 10 and 11 as being anticipated by Jimenez. We sustain the rejection of claims 10 and 11.

*The rejection of claims 12–14 and 16–18
as being anticipated by Hohlbein*

Appellant does not offer arguments in favor of claims 13, 14, and 16–18 separate from those presented for parent claim 12. *See* App. Br. 15–16; *see also* Reply Br. 2–5. We select claim 12 for review, with dependent claims 13, 14, and 16–18 standing or falling therewith.

The Examiner finds that Hohlbein discloses the various components of a product array comprising a first oral kit and a second oral kit in which each of the first and second oral kits comprises an oral care material and a toothbrush having a type of tooth cleaning element that provides an oral care benefit. *See* Final Act. 4–5 (citing Hohlbein Figs. 1–20B; ¶¶ 38, 39, 48, 49, 50, 71, 73, 77, 87, 105, and 125). The Examiner also finds that the oral care benefit associated with the first oral kit is different from the oral care benefit associated with the second oral kit, as claimed. *See* Final Act. 5.

Appellant contends: (1) “Hohlbein only discloses that the user may select different oral care materials and different oral care implements, and that the oral care implements and oral care materials may have different oral care benefits;” (2) “[i]n some embodiments the toothbrushes and the oral

care materials may be color coded to assist the user in selecting the desired combination of toothbrush and oral care material” and “it is unclear why there is any need for color coding *in those embodiments* where the toothbrush and oral care material are packaged together;” (3) “there is simply no suggestion of pairing specific cleaning elements and oral care materials in a particular package to achieve the same oral care benefit;” and, (4) “[i]t is entirely possible that different oral care benefits are used to negate sensitivity in combination with a plaque removal or whitening function.” App. Br. 16 (emphasis added).

Appellant’s contentions are unpersuasive. Hohlbein discloses: (1) “[i]t is thereby possible to select the *combination of configurations, materials and orientations to achieve specific intended results*, such as enhanced cleaning, tooth polishing, breath freshening, tooth whitening and/or massaging of the gums” (Hohlbein ¶ 39 (emphasis added)); (2) “[t]he oral care material may be a toothpaste, a gel, a mouthwash, a powder, or similar dentifrice or oral hygiene product, or a combination of the same (Hohlbein ¶ 48); (3) “active agents which can be used include antibacterial agents, whitening agents, anti-sensitivity agents, anti-inflammatory agents, anti-attachment agents, plaque indicator agents, flavorants, sensates, breath freshening agents, gum health agents and colorants” (Hohlbein ¶ 49); (4) “[t]he active agent also may be a tooth cleaning agent to boost the overall efficacy of brushing” (Hohlbein ¶ 50); (5) “in some embodiments, the plurality of oral care implements [] are all *identical* to each other” and “[i]n other embodiments, a *variety* of oral care implements are included” (Hohlbein ¶ 77 (emphasis added)); (6) “a *respective* individual dispenser may be provided for each *respective* oral care implement” (Hohlbein ¶ 87

(emphasis added)); and, (7) “the kit [] includes at least two *variations* of the oral care implement and at least two dispensers containing *respectively different* oral care materials” and “the oral care implements have a *respectively different* handle color for each *cleaning element type* or for accessory type, and the dispenser containing the *corresponding recommended oral care material* for each oral care implement type has the same color” (Hohlbein ¶ 125 (emphasis added)). Contrary to Appellant’s contention, these passages evidence that Hohlbein discloses pairing specific cleaning elements and oral care materials in a particular package to achieve a similar oral care benefit. *See also* Ans. 24–26. Further, as Appellant acknowledges above, Hohlbein uses color coding in *some embodiments* and, thus, not in all embodiments. *See* Ans. 26–27.

The Examiner points out that by Appellant (again) contending that “[i]t is entirely possible that different oral care benefits are used to negate sensitivity in combination with a plaque removal or whitening function” (App. Br. 16), Appellant is admitting that it is equally plausible that Hohlbein discloses providing cleaning elements and oral care materials with the same oral benefit. *See* Ans. 26–27. Moreover, we note that claim 12 does not specify what constitutes “an oral care benefit” or what feature makes an oral care benefit “different” from another oral care benefit.

We thus determine that the Examiner’s findings are proper. Accordingly, and based on the record presented, we are not persuaded the Examiner erred in rejecting claims 12–14 and 16–18 as being anticipated by Hohlbein. We sustain the rejection of claims 12–14 and 16–18. Further, in light of claims 19–21 depending from claim 12, and Appellant’s acknowledgement that these claims “stand or fall with independent claim

12” (App. Br. 4), we likewise sustain the Examiner’s rejection of claims 19–21.

*The rejection of claims 1–3 and 19–21
as being anticipated by Hohlbein, or,
alternatively, as being obvious over Hohlbein*

Appellant does not offer arguments in favor of claims 2 or 3 (nor of claims 19–21 (*see supra*)) separate from those presented for independent claim 1. *See* App. Br. 8–13; *see also* Reply Br. 2–5. We select claim 1 for review.

The Examiner finds that Hohlbein discloses all the limitations of claim 1. Final Act. 6–8 (citing Hohlbein Figs. 1–20B; ¶¶ 38, 39, 48, 49, 50, 71, 73, 77, 97, 105). More particularly, the Examiner finds that Hohlbein discloses the various steps of the claimed method of forming a product array of a plurality of oral care kits as replicated above, including the limitation

wherein the first oral care material is a tooth whitening agent, the first type of tooth cleaning element is a spiral bristle, the second oral care material is a tooth anti-sensitivity agent, and the second type of tooth cleaning element is a tapered bristle or an end-rounded bristle having a diameter of 5 mils or less.

Final Act. 7 (citing Hohlbein ¶¶ 39, 41, 49). Alternatively, the Examiner finds that it would have been obvious to modify the method of Hohlbein “to provide the first toothbrush with a spiral bristle paired, the first oral care material being a tooth whitening agent, the second toothbrush having tapered or end rounded bristle with a diameter of 5 mils or less and the second oral care material being a tooth anti-sensitivity agent” because Hohlbein “disclose[s] these bristle configurations and oral care compositions, which can be paired as desired and specifically teaches the advantage of pairing bristle configurations designed to achieve a desired oral are benefit (i.e.

whitening, polishing, cleaning, etc.) with an oral care composition for the same purpose.” Final Act. 8.

Appellant again contends: (1) “Hohlbein fails to teach or suggest specific pairings of oral care materials and cleaning elements to achieve a specific effect” (App. Br. 10); (2) “. . . the handles 14 and dispensers 96 are optionally color coded” (App. Br. 11); and, (3) “it is entirely plausible that one would use an oral care material for whitening in combination with cleaning elements that provide anti-sensitivity” (App. Br. 11). *See also* Reply Br. 2–4. These contentions are unpersuasive for the reasons discussed above.

Appellant also contends that “Hohlbein fails to teach or suggest providing a first oral care kit in a package having a tooth whitening agent paired with a spiral bristle or a second oral care kit in a package having an anti-sensitivity agent paired with tapered or end-rounded bristles of less than 5 mils diameter.” App. Br. 12. We agree with Appellant that “[a]lthough spiral bristles and active agents for tooth whitening and anti-sensitivity are generally disclosed, there is no disclosure of a kit having either of these combinations of features.” App. Br. 12. In other words, Hohlbein does not explicitly disclose the particular pairing of the specified tooth cleaning elements with the specified oral care material as recited in claim 1. Instead, as evidenced by Hohlbein’s teachings above, Hohlbein discloses that different combinations of these same components may be paired with each other. Our reviewing court has provided guidance that “[a]n anticipatory reference under 35 U.S.C. § 102 must clearly and unequivocally disclose the claimed compound or direct those skilled in the art to the compound without any need for picking, choosing, and combining various disclosures not

directly related to each other by the teachings of the cited reference” but that “[s]uch picking and choosing may be entirely proper in the making of a 103, obviousness rejection.” *In re Arkley*, 455 F.2d 586, 587–588 (CCPA 1972).

Appellant also argues that it is not obvious to modify the method of Hohlbein to provide these specific pairings. Reply Br. 3–5. Appellant contends, “[i]t is not obvious to make pairings of identical oral care benefits because there is simply no suggestion that such a configuration is any more desirable than complementary pairings.” Reply Br. 4.

Appellant’s argument is unpersuasive. As noted above, Hohlbein discloses that “[i]t is thereby possible to select the *combination of configurations, materials and orientations to achieve specific intended results*, such as enhanced cleaning, tooth polishing, breath freshening, tooth whitening and/or massaging of the gums.” Hohlbein ¶ 39 (emphasis added). Appellant does not dispute that Hohlbein discloses spiral bristles, tooth whitening agents, tooth anti-sensitivity agents, and tapered bristles or end-rounded bristles having a diameter of 5 mils or less. *See* Final Act. 5–6 (rejection of claims 17 and 18); *see also* Final Act. 7 (citing Hohlbein ¶¶ 39, 41, 49). We thus agree with the Examiner that, according to the alternative rejection, it would have been obvious to modify the method of Hohlbein to provide the specified pairings as claimed. This is because Hohlbein “disclose[s] these bristle configurations and oral care compositions, which can be paired as desired and specifically teaches the advantage of pairing bristle configurations designed to achieve a desired oral care benefit (i.e. whitening, polishing, cleaning, etc.) with an oral care composition for the same purpose.” Final Act. 8.

Accordingly, and based on the record presented, we are not persuaded the Examiner erred in rejecting claims 1–3 (nor also claims 19–21 (*see supra*)) as being obvious over Hohlbein. We thus sustain the rejection of these claims. In view of such findings, we need not also address the Examiner’s anticipation rejection of these same claims in view of Hohlbein.

*The rejection of claims 4 and 15
as being obvious over Hohlbein and Kirchhofer*

Appellant does not provide any substantive argument with respect to this rejection. App. Br. 4–17; Reply Br. 2–5. Accordingly, we likewise sustain the Examiner’s rejections of claims 4 and 15 over Hohlbein and Kirchhofer.

DECISION

The Examiner’s rejection of claim 16 as being indefinite is affirmed.

The Examiner’s rejection of claims 10 and 11 as being anticipated by Jimenez is affirmed.

The Examiner’s rejection of claims 12–14 and 16–18 (and also claims 19–21) as being anticipated by Hohlbein is affirmed.

The Examiner’s rejection of claims 1–3 (and also claims 19–21) as being unpatentable over Hohlbein is affirmed. We do not reach the rejection of these claims as being anticipated by Hohlbein.

The Examiner’s rejection of claims 4 and 15 as being unpatentable over Hohlbein and Kirchhofer is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED